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In the

Supreme Court of the United States

October Term, 1965

Nos. 315, 323 and 409

JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII, *Appellant,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAZUHISA ABE, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR PLAINTIFFS-APPELLEES

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR PLAINTIFFS-APPELLEES

QUESTIONS PRESENTED

1. Whether the apportionment of seats in the legislature of the State of Hawaii on the basis of registered voters violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the election of members of both houses of the legislature of the State of Hawaii from single-member districts and multi-member districts of varying sizes violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the legislature of the State of Hawaii is entitled to an opportunity to fashion a reapportionment plan covering both houses of the legislature.

STATEMENT

Plaintiffs filed their complaint on August 13, 1964. (R. 1) At that time a special session of the legislature, called specifically for the purpose of considering reapportionment problem, was in session but had not adopted any reapportionment plan. (R. 10-11, 54)

The material allegations of plaintiffs' complaint are correctly set forth in the statement of the case in the Governor's brief.

Upon the allegations of their complaint, plaintiffs prayed for the convening of a three-judge district court and sought injunctive or other relief applicable to the 1964 elections, and, in addition thereto, a judgment:

(a) declaring the invalidity of those portions of the State constitution which apportioned the senate on the basis of geography and the house of representatives on the basis of registered voters and which requires a majority vote in each of a majority of counties for constitutional amendment altering the representation from any senatorial district;

(b) declaring that the legislature may provide for apportionment by statute, pending the adoption of appropriate constitutional amendment;

(c) ordering the 1966 elections to be conducted in accord-

ance with reapportionment plan prepared by the court upon failure of enactment of a valid reapportionment statute or adoption of a valid constitutional amendment; and

(d) retaining jurisdiction of the cause to review any reapportionment plan which may be enacted or adopted, and, in that connection, to permit plaintiffs to amend their complaint and pray for appropriate relief. (R. 11-13)

A three-judge court convened on August 24, 1964. At that time, Governor Burns was allowed to intervene as plaintiff and certain senators and representatives were allowed to intervene as defendants. (R. 37, 43, 49, 191) On August 26, 1964, the court denied injunctive and other relief applicable to the 1964 elections because the elections were imminent, an injunction would have disruptive effects on the elections, and the legislature was in session to consider the problems of reapportionment. (R. 63, 192) On the same day, the legislature adjourned without taking any action on reapportionment. (R. 54) This was disappointing to the court. (R. 78) The court set the case for hearing on the merits on January 11, 1965. (R. 192)

The hearing on the merits commenced on January 11, 1965, as ordered by the court, and was concluded two days later. On February 17, 1965, one week before the convening of the regular session of the Third State Legislature, the court announced its decision and order in which it declared and ordered:

1. that the provisions of Article III, Section 2, of the State constitution fixing the number of senators per senatorial district are invalid, but the remainder of Article III is valid.

2. that the proviso at the end of the sixth paragraph of Article XV, Section 2, pertaining to amendments affecting representation in the senate is invalid, but the remainder of Article XV is valid;

3. that the plaintiffs and intervening plaintiff failed to prove that the apportionment of the house of representatives causes any invidious discrimination in the weight of their vote or is the result of arbitrary or capricious action;

4. that the Third State Legislature may convene in regular session, take such actions as are necessary to organize the

respective houses, and appropriate funds for the session, but shall not take final action on any other legislation until it shall have enacted into law a legislation:

(a) providing for submission to the people of Hawaii at a special election to be held not later than August 1, 1965, pursuant to Article XV of the constitution, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?"

(b) providing for any and all acts required by law to implement such legislation;

(c) providing for the holding, if the vote shall be in the constitutional affirmative, of a special election not later than September 15, 1965, for the election of delegates to the convention in the manner provided in the constitution, the legislation to include legislative action under the fourth paragraph of Article XV, Section 2, of the constitution, if the legislature so wills;

(d) providing for the convening of the convention not later than October 15, 1965, and the completion of its deliberation in time to submit its proposed constitutional amendments to the electorate at a special election to be held not later than January 30, 1966, such amendments to include, but not limited to, provisions for reapportioning the senate on a constitutionally valid basis; and

(e) providing appropriation and funds for such elections and convention.

5. that the offices of all senators shall become vacant as of the day of the general election of 1966, but until such date the existing offices of all senators elected under Article III, Section 2, of the constitution shall be valid; and

6. that the court retains jurisdiction of the cause for all purposes, including, but not limited to:

(a) considering appropriate sanctions if the orders of the court are not carried out; and

(b) judicially reapportioning the senate in the event the electors reject a constitutional convention, or the convention fails to propose an amendment reapportioning the senate, or the electors reject such amendment, or if the amendment proposed by the convention does not insure the apportionment of the senate in accordance with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. (R. 79-81)

The remainder of Article III of the State constitution which the court declared valid under paragraph 1 of its February 17, 1965, decision and order includes:

(a) the remainder of Section 2, which sets the number of senators at 25, the number of senatorial districts at 6, and describes the geographical limits of each senatorial district;

(b) all of Section 3 (including the Schedule in Article XVI which is incorporated in Section 3 by reference), which sets the number of representatives at 51, the number of representative districts at 18, describes the geographical limits of each representative district, and fixes the number of representatives to be elected from each representative district; and

(c) all of Section 4, which provides for reapportionment of the house of representatives on registered-voter basis without changing the boundaries of the representative districts except where the number of registered voters in any representative district is less than one-half of the quotient obtained by dividing the total number of registered voters in the State by the total number of members of the house of representatives.

The remainder of Article XV of the constitution which the court declared valid under paragraph 2 of the decision and order includes:

(a) the first paragraph of Section 1, which provides that constitutional amendments may be proposed by a constitutional convention or by the legislature;

(b) the fourth paragraph of Section 2, which provides that, unless the legislature provides otherwise, there shall be the same number of delegates to the convention, elected from the same areas, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950; and

(c) all of Section 3, which establishes the procedure for constitutional amendment where an amendment is proposed by the legislature.

The court ordered reapportionment by constitutional convention because it felt compelled to do so in the face of the failure of the legislature to take any action during its special reapportionment session. (R. 88) It did not limit the convention to a consideration of reapportionment of the senate, but stated that the delegates may review and reconsider the respective merits of apportionment based on total population, citizen population, or eligible voters, as against the existing registered-voter basis, and also the respective merits of having the members of one or both houses of the legislature elected from single member districts as against having the members of one or both houses elected, in whole or in part, from multi-member or floterial districts and justifying the same. (R. 79)

On March 1, 1965, the senators and representatives, who had intervened as intervenors-defendants, filed a motion to amend the February 17, 1965, decision and order to allow the legislature:

(a) to adopt a redistricting plan for the senate on the basis of 1964 registered voters, subject to approval by the court;

(b) to adopt a proposed constitutional amendment, embodying pertinent provisions of the foregoing plan, to be presented to the electorate for ratification at the 1966 general election, subject to approval by the court; and

(c) to enact legislation providing for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the constitution?" (R. 83)

The intervenors-defendants gave the following reasons for the motion:

(a) the State Department of Budget and Finance estimated the total cost of the constitutional convention and the three elections to be in excess of $1,000,000;

(b) the holding of three elections and a convention in a period of six months would be unduly cumbersome;

(c) the convention would not be limited to a consideration of senatorial reapportionment and might be diverted from its primary task;

(d) Article XV, Section 2, of the constitution mandates the lieutenant governor to submit to the people at the 1970 general election the quesiton as to whether a convention should be held; and

(e) the legislature contemplates submitting to the people at the 1966 general election the question as to whether a constitutional convention should be held. (R. 86)

All parties joined in the motion. (R. 88, 194) The court granted the motion on March 9, 1965, stating: "Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be constitutionally justified." (R. 88)

On April 15, 1965, the intervenors-defendants presented the plan of the legislature embodied in:

1. H. B. No. 987, S. D. 1, C. D. 1, being a reapportionment and redistricting plan for the senate on the basis of 1964 registered voters;

2. H. B. No. 773, S. D. 1, C. D. 1, being a proposed constitutional amendment embodying pertinent provisions of H. B. No. 987, S. D. 1, C. D. 1, to be submitted to the electorate for ratification at the 1966 general election; and

3. H. B. No. 986, being legislation providing for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision or amendments to the constitution?" (R. 103)

H. B. No. 987, S. D. 1, C. D. 1, and H. B. 773, S. D. 1, C. D. 1, will be referred to hereafter in this brief as H. B. 987 and H. B. 773, respectively.

Together with the foregoing legislation, the intervenors-defendants presented conference committee reports which set forth the reasons and justification for the legislation. (R. 105, 109)

The legislation embodied in H. B. No. 987 was to become effective for the 1966 general election and to remain in effect until superseded by constitutional amendment.

Under the order granting the motion of intervenors-defendants, only the senate was to be reapportioned. (R. 88) Consequently, the legislature concerned itself solely with senatorial reapportionment and did not give any consideration to reapportionment of the house of representatives. (R. 297)

The plan submitted by the legislature to the court kept the number of senators at 25, constituted each of the counties of Hawaii, Maui and Kauai as a senatorial district, divided the island of Oahu (which constitutes the City and County of Honolulu) into five senatorial districts, and apportioned the senators to the senatorial districts on the basis of the 1964 registered voters, as follows:

Senatorial Districts		Number of Senators	1964 Registered Voters	Registered Voters Per Senator
Hawaii	First	3	28,130	9,377
Maui	Second	2	18,786	9,393
Oahu	Third	3	27,073	9,024
	Fourth	4	35,780	8,945
	Fifth	4	39,361	9,840
	Sixth	4	40,629	10,157
	Seventh	4	37,336	9,334
Kauai	Eighth	1	12,266	12,266
		25	239,361	

Average: 239,361 ÷ 25 = 9,574
(Ex. S-8, R. 411)

On April 28, 1965, the court entered its decision and order rejecting the plan embodied in H. B. No. 987, and in view thereof, found it unnecessary to consider H. B. No. 773 and H. B. No. 986.

The plan of the legislature appeared doomed from the start, for the judges had previously circulated a memorandum, which stated:

"We believe the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas."

The court rejected the plan on the following grounds:

(a) in fixing the boundaries of senatorial districts, only geographical boundaries, historical representative district lines, and the number of registered voters were considered, and ethnic, political, industrial, economic, social, and occupational factors, and community of interests and problems were ignored; (R. 156)

(b) by fixing the boundaries of multi-member senatorial districts along multi-member representative district lines, political monoliths were created, giving the voters in such districts political weight far in excess of the political weight of voters in smaller districts; (R. 160)

(c) the legislature ignored the red lights flashed by the court, and viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives; (R. 162)

(d) it was manifest to the court "that the legislature's adamant insistence on three- and four-member senatorial districting was the conscious or unconscious — though not unnatural — reluctance of the affected senators to carve out single-member districts which thereafter would

in all probability result in a political duel-to-the-death with a fellow and neighbor senator." (R. 163)

There were three principal witnesses at the hearings in this case: Robert Schmitt, State Statistician; Eileen Lota, Clerk of the City and County of Honolulu; and Sakae Takahashi, State Senator and Chairman of the Senate Conference Committee.

Schmitt testified regarding the problems involved in basing apportionment on total population, citizen population or eligible voters as against registered voters. He made the following points: Detailed information regarding registered voters is readily available for each representative district. (R. 221) Such is not the case with citizen population and eligible voters. (R. 220) Figures on citizen population and eligible voters can be estimated for the State as a whole and for each county, but not for election districts. Even in the case of total population, figures are not available for election districts because census enumeration is made by census tracts which seldom coincide with election district boundaries. (R. 219) Another problem with the use of total population as apportionment base is the presence of military personnel and their dependents. In 1960, military personnel and their dependents in Hawaii numbered 112,938 out of the total State population of 632,772. (Ex. 15, Table 1, R. 260, 379) Military personnel and their dependents are concentrated almost entirely on Oahu. (Ex. 15, Table 3, R. 381), and in parts of Oahu where military installations are concentrated. (Ex. 17, R. 261) A vast majority of them do not have the residential requirement for voting. It is possible to create an election district composed entirely of military personnel and their dependents without a single registered voter in the district. (R. 275)

Schmitt also testified regarding problems connected with districting. He stated that it is not an easy matter to carve out an election district composed of a homogeneous group even in designing a single member representative district. (R. 225) He was of the opinion that senatorial districts delineated in H. B. No. 987 was well thought out "on the basis of substantial equality of the number of registered voters, on the use of long-standing statistical and taxation and land division boundaries, on contiguity and compactness." (R. 317) He also expressed his

view on multi-member districts, by referring to the law of large numbers and stating that a small area with a large number of small districts would be subject to considerable fluctuation in short period of time in the number of registered voters, whereas a small number of large districts would be subject to much less fluctuation in the number of registered voters. (R. 318)

Lota testified to the effort made by the office of the clerk of the City and County of Honolulu, as well as by the office of the clerk of each of the other counties, to register as many eligible voters as possible. Her testimony showed that her office is open for registration throughout the year, except for 30 days before primary elections, and 10 days before general elections and special efforts are made to encourage registration before elections. (R. 277) For instance, before the 1960 elections, she deputized 200 volunteer registrars. (R. 278) These volunteers were stationed at various points on Oahu, and the places and hours of registration were made known throughout the community by distribution of information sheet (Ex. B, R. 279, 402) and by newspaper advertisements. (R. 278) These volunteers were available from June 1 to the elections in October and November. (R. 279)

Lota also testified regarding the registration of military personnel and their dependents. According to her testimony, military personnel and their dependents are required to live off base to establish their voting residence; their period of required residence does not begin to run until their intention to reside permanently in Hawaii is entered in their service records; otherwise, the requirements for their registration are identical with the requirements applicable to civilian registrants (R. 280); and her office always registered military personnel who showed the necessary qualifications. (R. 285)

Takahashi testified regarding the discussion in the Conference Committee which led to the decision to have five multi-member senatorial districts on Oahu and one multi-member senatorial district on Hawaii. On Oahu 5-senator districts were considered and dropped because a district with five senators would have 20 percent representation, which was thought to be too large for any district. A plan to establish senatorial districts along traditional and well defined geographical lines was also

discussed and dropped because such plan would result in the senatorial districts having the same boundaries as the representative districts. So, the final plan was agreed upon which left only one senatorial district with the same boundaries as the representative district. (R. 299) With reference to the island of Hawaii, Takahashi testified that it was decided to have one senatorial district with three senators because the present second senatorial district, with 7,000 registered voters, was considered too small for a separate senatorial district. (R. 304) The legislators did not favor single member districts for the senate nor even two-member districts. Such districts were considered too small and conducive to localized thinking. (R. 295, 297, 298)

After the entry of the April 28, 1965, decision and order, Governor Burns and intervenors-defendants appealed to this Court. Plaintiffs did not appeal. Plaintiffs' principal objective of having proper representation in the senate for Oahu will be accomplished by the order requiring the convening of a constitutional convention, which will not be limited to a consideration of senatorial reapportionment but may consider other subjects, including reapportionment of the house of representatives. However, plaintiffs' failure to appeal is not based on their total agreement with the decision and order. Inasmuch as the case is on appeal, they participate therein and respectfully state their position on the questions presented on the appeal. Their position on the questions presented, other than on the validity of the use of registered voters as the basis of reapportionment, may be inconsistent with their failure to appeal. Nevertheless, they state their position on the premise that in a reapportionment case they may point out errors, despite their failure to appeal, so that this Court may determine the basic standards and state the applicable guidelines. *Reynolds* v. *Sims*, 377 U. S. 533, 559.

ARGUMENT

I. APPORTIONMENT OF SEATS IN THE LEGISLATURE OF THE STATE OF HAWAII ON THE BASIS OF REGISTERED VOTERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Plaintiffs contended in the district court that the use of registered-voter basis for apportionment results in a grossly unfair weighting of both houses of the legislature in favor of the lesser populated areas of the State. (R. 8) However, under the evidence adduced at the hearings, they accede to the holding of the district court that in Hawaii the use of registered voters as a basis of apportionment does not operate to minimize or cancel out the voting strength of any element of the voting population. (R. 75)

In *Reynolds* v. *Sims*, 377 U. S. 533, 568, this Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," and that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

In *WMCA, Inc.* v. *Lomenzo*, 382 U. S. 4, this Court in effect held that apportionment on the basis of citizen population, namely, total population less aliens, meets the requirements of the Equal Protection Clause by affirming the decision of the district court in the same case reported in 238 F. Supp. 916.

This Court's affirmance of *WMCA, Inc.* v. *Lomenzo* also included affirmance of the district court's rejection of the votes cast in the 1962 New York gubernatorial election as a basis of apportionment. However, the district court's rejection in that regard was based on the court's conclusion that the voter basis was used to perpetuate, and was but a ghost of, prior malapportionment.

In *Buckley* v. *Hoff*, 243 F. Supp. 873, the district court held that Vermont reapportionment, which reapportioned the senate on total residents basis along county lines and the house of rep-

resentatives on registered voter basis along town lines met Federal constitutional requirements. The decision in the case was written by Judge Waterman, who wrote the district court decision in *WMCA, Inc.* v. *Lomenzo*. In the decision, Judge Waterman referred to the following statement in *Reynolds* v. *Sims*, 377 U. S. 533, 577:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents*, or *citizens*, or *voters*. Mathematical exactness or precision is hardly a workable constitutional requirement." (Emphasis supplied)

Ellis v. *Mayor of Baltimore*, 234 F. Supp. 945, 953, contains a statement that a careful reading of *Reynolds* v. *Sims* makes it clear that "the basic constitutional protection is one of equal representation by population, and not equal representation by registered voters." However, in that case, the reapportionment did not meet the requirements of the Equal Protection Clause, under either basis, population or registered voters.

In Hawaii, the apparent underrepresentation of certain districts on population basis is due to the presence of military personnel and their dependents. There is no discrimination against them in voting registration. (R. 285) Most of them simply do not meet the residential requirement because of the temporary nature of their stay.

The effect of the presence of military personnel and their dependents may be shown by considering the Tenth and Eleventh Representative Districts, which, according to Exhibit 1 (R. 202, 339) are the most underrepresented districts on population basis. All of the major military installations are in those districts, except Kaneohe Marine Base, which is in the Eighth Representative District. (Ex. 17, R. 261)

	Population 4-1-60	Representatives on Population Basis	Registered Voters 11-1-60	Representatives on Registered Voter Basis
Tenth District	95,118	8	17,003	4
Eleventh District..	57,743	5	12,553	3
	152,861	13	29,556	7

Total population of State (Ex. 1, R. 202, 339)	632,772
Number of representatives	51
Average population per representative	12,407
Population represented by 7 representatives	86,849
Population not represented (152,861—86,849)	66,012

The total number of military personnel and their dependents in Hawaii in 1960 was 112,938, of whom 60,057 were dependents. (Ex. 15, R. 260, 379) The unrepresented population of 66,012 can be fully accounted for by the presence of military personnel and their dependents in those districts.

In *Davis* v. *Mann*, 377 U. S. 678, 691, in answer to the argument that underrepresentation was caused by the presence of military and military related personnel, this Court stated: "Discrimination against a class of individuals, merely because of the nature of their employment, *without more being shown*, is constitutionally impermissible." (Emphasis supplied)

Eileen Lota's testimony showed that in Hawaii there is no discrimination against military personnel and their dependents, that they are entitled to registration if they meet the requirements other citizens are required to meet.

II. ELECTION OF MEMBERS OF BOTH HOUSES OF THE LEGISLATURE OF HAWAII FROM SINGLE-MEMBER AND MULTI-MEMBER DISTRICTS OF VARYING SIZES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A. *Multi-member districts are constitutionally permissible.*

In *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 731, n. 21, this Court, although critical of the multi-member districting in proposed Amendment No. 8 to the Colorado Constitution which provided for the election of 8 senators and 17 representatives from Denver, stated: "We do not inti-

mate that apportionment schemes which provide for the at large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

In *Forty-Fourth General Assembly of Colorado* v. *Lucas*, 379 U. S. 693, this Court vacated the judgment of the district court reported in 232 F. Supp. 797, insofar as the judgment decided non-Federal questions in the light of the decisions of the Colorado Supreme Court in *White* v. *Anderson*, 394 P. 2d 333, which held that subdistricting of a county violates the Colorado constitution. This in effect is a holding that Colorado may have multi-member districts for both houses.

In *Fortson* v. *Dorsey*, 379 U. S. 433, this Court held that multi-member districting in Georgia's 1962 Senatorial Reapportionment Act is not per se unconstitutional, although it added a caveat that "our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause."

In *Burnette* v. *Davis*, 382 U. S. 42, this Court affirmed the decision in *Mann* v. *Davis*, 245 F. Supp. 241, which approved the consolidation of Richmond and Henrico County into a single multi-member district electing 8 delegates to the Virginia House of Delegates.

In *Buckley* v. *Hoff*, 243 F. Supp. 873, the district court found no constitutional infirmity in the Vermont reapportionment which provided the following representation:

Senate—30 senators

2 single member districts electing	1 senator each
6 multi-member districts electing	2 senators each
2 multi-member districts electing	3 senators each
1 multi-member district electing	4 senators
1 multi-member district electing	6 senators

House of Representatives—150 representatives

36 single member districts electing	1 representative each
22 multi-member districts electing	2 representatives each
6 multi-member districts electing	3 representatives each
3 multi-member districts electing	4 representatives each
2 multi-member districts electing	5 representatives each
1 multi-member district electing	6 representatives
1 multi-member district electing	9 representatives
1 multi-member district electing	15 representatives

In *Butcher* v. *Bloom*, 415 Pa. 438, 467, 203 A. 2d 556, 572, the Pennsylvania Supreme Court stated that the creation of multi-member districts, of itself, would not violate the Federal Constitution simply because the voters in a particular district would vote for two or more legislators while those in another district would vote for a lesser number. However, it stated that a legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable.

Multi-member districts comport not only with constitutional requirements but also with democratic process. In an article entitled: "A New Look at Constituencies: The Need for a Recount and a Reappraisal," in 49 American Political Science Review 1105 (1955), Maurice Klain reported that in 1954 out of 1,841 senate seats in the United States 221, or about 12 percent were contested in multi-member constituencies, and out of 5,762 seats in the lower houses 2,616, or about 45 percent, were so contested, and wrote:

> "The multiple district is no departure from the good old days and the tried old ways. It is not, as the giants of the type might lead one nowadays to think, a makeshift arrangement inspired by urban agglomerates. Neither the multiple district nor its widespread use is an emergent of recent times. It is the single member district that stands outside of history, an alien to the past, a new-fangled and upstart thing.
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> "* * * * *
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> "* * * In 1951 a special committee of the [American Political Science] Association, reporting a study made for

federal agencies, referred to one-member elections as 'this desirable requirement,' apparently on the assumption that single districts yield the more democratic representation. Where is the evidence? Is apportionment more nearly equal in, say, New York than Massachusetts, Wisconsin than Illinois, California than Washington?[1] The supreme court of New Jersey concluded years ago that single districts, compared to multiple, provide greater opportunities and temptations to gerrymander. More recently political scientists have suggested, unfortunately without proof, that equal representation is technically more feasible with multiple districts. Comparative studies would clearly be useful.

"Such studies, moreover, should interest the friends of party government. In political debate critics and champions have agreed that one-member elections work against party cohesion. * * *. The single district, critics say, is the answer to a pressure group's prayer. The representative for such a district, they contend, is more at the mercy of factional power than the several spokesmen for a multiple district. Upon him alone the group concentrates its fire. He is a lone wolf soon made into a sitting duck. * * *. What is more, critics argue, the representatives tend to develop a narrowness of outlook, a preoccupation with local concerns, a passion for logroll and the pork barrel.

* * *

"Champions of the single district, on the other hand, claim that the voter's control is strengthened, his power of choice enhanced. They rejoice that one-member elections break up 'caucus combinations' and focus attention upon 'the man rather than the party.' For this reason, they insist, 'better' men enter the race and win. Earlier, Montesquieu offered a similar argument, asserting that single districts encourage the electorate to choose with discrimination.

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[1] At the time of this study, California, Delaware, Kansas, Kentucky, Missouri, Nebraska, New York, Rhode Island and Wisconsin elected all legislators from single member districts.

Nowadays good government reformers as well as the textbooks echo this assertion.

"It has not gone unchallenged. Bryce, Luce, and other competent observers have testified that multiple districts, embracing sizeable constituencies, are the more likely to recruit men of breadth and eminence—men who may be passed over or repelled by the triviality and localism of single-district politics. * * *"

B. *Multi-member districting in H. B. No. 987 is not arbitrary.*

In the State of Hawaii the counties of Hawaii, Maui and Kauai, and the City and County of Honolulu are physically separated. (R. 57) Historically also, the four major islands have constituted separate political units. (R. 64) Consequently, it is logical to constitute each of the counties of Hawaii, Maui and Kauai as separate senatorial districts.

The consolidation of existing first and second senatorial districts on the island of Hawaii into one senatorial district electing three senators, instead of retaining the existing districting with two senators apportioned to the first senatorial district and one senator apportioned to the second senatorial district, is a political decision without constitutional implication. It was done because the number of registered voters in the existing first senatorial district is too large for two senators and the number of registered voters in the existing second senatorial district is too small for one senator, and the legislators decided to "equalize the figures." (R. 305) This is identical with the procedure used in Virginia when Richmond was combined with Henrico County. Richmond had sufficient population for 5 delegates but not enough for 6; Henrico County had enough for 2 but not enough for a third. So, they were combined into a multi-member district of 8 delegates. *Mann* v. *Davis*, 245 F. Supp. 241.

With reference to the districting on Oahu, the testimony of Schmitt was that "on the basis of substantial equality of the number of registered voters, on the use of longstanding statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out."

The district court was critical of the proposed senatorial reapportionment on Oahu because it ignored ethnic, political,

industrial, economic, social, and occupational factors, and community of interests and problems. (R. 156)

Under a guideline laid down by this Court, such factors cannot be considered. In *Reynolds* v. *Sims*, 377 U. S. 533, 579, this Court stated that "neither history alone, nor *economic or other sorts of group interests*, are permissible factors in attempting to justify disparities in population-based representation." (Emphasis supplied) That this proscription applies not only in connection with attempts to justify disparities in representation but generally in connection with districting may be inferred from Mr. Justice Stewart's dissent in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 749.

The district court referred to Schmitt's testimony that the proposed fifth senatorial district encompassed a highly heterogeneous area containing "a multitude of Caucasian widows in the upland area, and an overabundance of Filipino males in the seaward portion of the district." (R. 157) By this reference, did the court mean that the legislature should have carved out one single-member district to give representation to Caucasian widows in the upland area and another single-member district to give representation to Filipino males in the seaward portion? If so, it runs counter to *Gomillion* v. *Lightfoot*, 364 U. S. 339.

In *Mann* v. *Davis*, 245 F. Supp. 241, one of the parties advanced a contention which was *Gomillion* in reverse. He objected to the consolidation of Richmond and Henrico County because the consolidation reduced the relative political strength of the colored population of Richmond, and objected to the creation of a multi-member district encompassing the two areas because, if Richmond had been divided into five single-member districts, the colored population of Richmond could have elected one or more delegates to the House of Delegates. The district court rejected the contention and this Court affirmed. *Burnette* v. *Davis*, 382 U. S. 42.

Under another guideline of this Court, political subdivision lines, and natural or historical boundary lines, may be used in establishing state legislative districts to prevent gerrymandering and provide compact districts of contiguous territory. *Reynolds* v. *Sims*, 377 U. S. 533, 578. This rules out interest representation.

Political scientists say that diversity of interests is preferable to homogeneity in a political unit. In Seymour Martin Lipset's *Political Man* (1959), 86-91, it is stated that a system in which the support of different parties corresponds too closely to basic social divisions would reflect a state of conflict so intense and clear-cut as to rule out compromise and threaten the foundations of democracy, and that the chances of stable democracy are enhanced to the extent that groups and individuals have a number of cross-cutting, politically relevant affiliations. Paul Ylvisaker in an article entitled, *Some Criteria for A "Proper" Areal Division of Governmental Powers,* in Arthur Maass' *Area and Power: A Theory of Local Government* (1959), lays down the maxim that "The component areas should be constituted of sufficient diversity of interests to ensure effective debate within each component and transcending communities of interest among the several components."

The district court attributed the legislature's insistence on multi-member districting, despite the intimation of the court that such would not be acceptable, to the desire of the senators for self-preservation. Evidence is otherwise, except for the inference that may be drawn from the fact that a number of senators live in close proximity to each other, posing a possibility of head-on contest if single member districting were adopted. Be that as it may, the motive of the legislature is immaterial in judging the constitutionality of its act. *United States* v. *Des Moines Navigation and Railway Company,* 142 U. S. 510, 544; *Otis* v. *Parker,* 187 U. S. 606, 608.

In *United States* v. *Des Moines Navigation and Railway Company,* this Court quoted with approval the following statement from Cooley's *Constitutional Limitations,* 5th ed., 222:

> "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature in the particular case, in respect to the subject matter of the Act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire

into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. * * *. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

III. THE LEGISLATURE OF THE STATE OF HAWAII IS ENTITLED TO AN OPPORTUNITY TO FASHION A REAPPORTIONMENT PLAN COVERING BOTH HOUSES OF THE LEGISLATURE, IF THE PLAN FOR THE REAPPORTIONMENT OF THE SENATE IN H. B. NO. 987, CONSIDERED TOGETHER WITH THE EXISTING APPORTIONMENT OF THE HOUSE OF REPRESENTATIVES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Plaintiffs contended in the district court that the apportionment plan covering both the senate and the house of representatives of the State legislature is an integrated overall scheme for legislative representation, that the portion of the plan covering the house of representatives is not severable from the portion covering the senate, and that the invalidity of the apportionment of the senate invalidates that of the house of representatives. (R. 4, 66)

This contention was in accordance with the holding in *Maryland Committee* v. *Tawes*, 377 U. S. 656, 673, where this Court stated:

"* * * in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportion-

ment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature."

The district court rejected plaintiffs' contention in its decision and order of February 17, 1965, (R. 66) and, pursuant to its finding of invalidity of the plan of senatorial apportionment provided in the State constitution (R. 65), ordered the convening of a constitutional convention and retained jurisdiction to "judicially reapportion the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment. * * *"

The motion of the intervenors-defendants to amend and alter followed. (R. 83) The court granted the motion, and ordered legislative reapportionment of the senate on the basis of the number of voters registered at the 1964 general election. (R. 89) Here, the thing that should be particularly emphasized is that the motion of the intervenors-defendants covered the reapportionment of the senate only and the court order covered the senate only. Consequently, the legislature deliberated solely on the question of senatorial reapportionment and gave no consideration to reapportionment of the house of representatives. (R. 297)

While the legislature was deliberating on the question of reapportionment, the court released its memorandum which indicated that any plan for the election of senators from multi-member districts, except possibly "one or two 2-member districts in the neighbor islands," was doomed. (Governor Burns' Brief, Appendices, 28a) Neither in that memorandum nor in any other manner did the court indicate to the legislature that it should or could consider the reapportionment of the house of representatives.

Plaintiffs submit that the district court erred in its holding in its February 17, 1965, decision and order that the house of representatives was constitutionally apportioned, independently of the apportionment of the senate. After announcing its decision the court had some very serious qualms about it. This is shown in Judge Beeks' statement at the hearing on the approval of H. B. No. 987: "Speaking solely for myself, I am beginning

to have great doubts as to whether we were right in the first place." (R. 311) It is also shown in the following statements in the April 28, 1965, decision and order:

> "Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the makeup of all other representative districts in the State, the 15th is too large. * * * (R. 158)
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> * * * * * *
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> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. * * * (R. 159)
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> * * * * * *
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> "* * * because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme. * * *" (R. 162)

In *Fortson* v. *Toombs*, 379 U. S. 621, 625, Mr. Justice Harlan alludes to the lower courts ranging "so far afield as to hamstring state legislatures." In Hawaii, the legislature was so hamstrung into considering the senatorial reapportionment on the court's terms.

In its April 28, 1965, decision and order, the court stated: "This court indicated the means by which the senate could be apportioned to give every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162) The reference obviously is to the memorandum that multi-member districts would be frowned upon.

The effect of that memorandum was to reduce the legislature to a position of being merely an administrative arm of Federal judiciary to delineate senatorial district boundary lines, instead of being an independent, deliberative body of a sovereign state, for it, in effect, said: "We decided that the house of representatives is apportioned constitutionally. So, leave it alone. If the house is left alone, the only way to reapportion the Senate is to have the senators elected from single-member districts. We may allow one or two 2-member districts on the other islands, but we see no reason for allowing any multi-member district on Oahu."

That left the legislature no choice. Nevertheless, the legislature, as an independent deliberative body answerable to the people of Hawaii, deliberated and came out with a plan which Schmitt testified was "well thought out" and which, plaintiffs submit, is thought out better than the existing plan for the house of representatives.

If the creation of large multi-member districts brings about invidious discrimination against the voters of the small districts, such discrimination will result not from the senate reapportionment in H. B. No. 987, but from the existing house apportionment, which shows a wider spread in representation from the representative districts than the spread in the proposed plan for the senate.

While plaintiffs maintain, as stated above, that the district court erred in holding the apportionment of the house of representatives constitutional independently of the apportionment of the senate, it is not their position that the existing house apportionment, in fact, fails to meet constitutional standards. Plaintiffs submit that there is no constitutional infirmity in the apportionment consisting of the existing house apportionment and the senate reapportionment proposed in H. B. No. 987, and that the district court should have approved H. B. No. 987, together with H. B. No. 773 and H. B. No. 986.

However, if this Court should decide that such package does not comport with Federal constitutional requirements, then it is submitted that the State legislature should be given an opportunity to reconsider the existing apportionment of the house of representatives and come up with a plan covering both houses of the legislature. The legislature has not yet had such opportunity.

It may be that the February 17, 1965, decision and order has frozen the attitude of the house members. However, it must be assumed that legislators are reasonable men.

CONCLUSION

For the foregoing reasons, the case should be remanded to the district court (a) to approve H. B. No. 987, together with H. B. No. 773 and H. B. No. 986, or (b), if this Court should decide that the apportionment of the legislature, consisting of the existing apportionment of the house of representatives and the senate reapportionment proposed in H. B. No. 987, violates the Equal Protection Clause of the Constitution of the United States, to order that the legislature fashion a reapportionment plan covering both houses of the State legislature to be used for the 1966 election and to remain in effect until superseded by constitutional amendment, and also a proposed constitutional amendment for reapportionment of both houses of the legislature to be submitted to the electorate for ratification.

Respectfully submitted,

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